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IN THE

Supreme Court of the United States

JOHN BURKEY,

Petitioner,

v.

HELEN J. MARBERRY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was sentenced to a term of imprisonment, followed by a term of supervised release. He filed a petition for habeas corpus under 28 U.S.C. § 2241, alleging that he was being held in prison beyond his proper release date. A magistrate judge agreed. But before petitioner's case was finally adjudicated, the Bureau of Prisons released him. Petitioner continued to pursue his claim that he had been imprisoned too long in order to support an application to reduce his period of supervised release. The Third Circuit, in acknowledged conflict with decisions of other circuits, dismissed the petition as moot.

The Question Presented is:

Whether a prisoner's challenge to his continued detention is mooted by his release when a judgment in his favor would establish that he was incarcerated beyond the proper expiration of his prison term, thereby supporting a claim for reduction in his term of supervised release.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Burkey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-17a) is published at 556 F.3d 142. The district court's opinion (Pet. App. 18a-26a) is unreported. The magistrate judge's opinion (Pet. App. 27a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III of the U.S. Constitution provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies to which the United States shall be a Party."

18 U.S.C. § 3583(e) provides, in relevant part:

(e) Modification of conditions or revocation.

The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

> (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.

STATEMENT OF THE CASE

Petitioner sought post-conviction relief, alleging that the government was improperly denying him early release from prison. A magistrate judge agreed, but – before the case was finally adjudicated – the government released petitioner from prison. Petitioner continued to pursue his claim to support an application for a reduction in his term of supervised release. The Third Circuit held that his post-conviction application was moot, acknowledging a square circuit split on that question.

1. In 1996, petitioner John Burkey, who was convicted and serving a sentence for a controlled substances crime, was found eligible to participate in the Bureau of Prisons' residential drug abuse program ("RDAP"). Upon completing the RDAP, petitioner was granted early release pursuant to 18 U.S.C. § 3621(e)(2)(B).

While on supervised release, petitioner was convicted of a new controlled substance crime and

sentenced to 57 months' imprisonment.[1] Originally, the Bureau of Prisons (BOP) informed petitioner that he was eligible to re-enroll in its RDAP, and that completion of the program would again render him eligible for early release. Pet. App. 34a. But after petitioner was transferred to a different facility to begin the RDAP, the BOP changed its position, telling petitioner that although he was qualified to participate in the program, completion would not result in early release. The BOP relied on its intervening issuance of Program Statement 5331.01(5)(c), in October 2003, which provides in pertinent part that "[i]nmates may earn an early release for successful RDAP completion only once." FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT NO. 5331.01 (2003), *available at* http://www.bop.gov/policy/progstat/5331_001.pdf.

After completing the RDAP and exhausting all of his administrative remedies, petitioner filed a petition for habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the Western District of Pennsylvania. Petitioner challenged the BOP's determination that he was not eligible for early release, arguing that the BOP's issuance of Program Statement 5331.01(5)(c) violated the Administrative Procedure Act, 5 U.S.C. § 553.

2. On August 31, 2007, a magistrate judge recommended that the district court grant petitioner's application. The magistrate judge agreed

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[1] The sentencing court also ordered petitioner to serve, concurrent to his 57-month prison term, a three-month term for violating the terms of his supervised release.

that the BOP had violated the APA in promulgating the Program Statement. Pet. App. 39a. In reaching that conclusion, the magistrate judge called BOP's defense of the rulemaking process "patently wrong," "unsupportable," and "unconvincing." Pet. App. 39a-40a.

The BOP declined to challenge the magistrate judge's findings. Pet. App. 19a. Instead, just seven days after the magistrate judge issued her recommendation, the BOP voluntarily released petitioner from prison and filed a Notice of Suggestion of Mootness. Pet. App. 5a.

Petitioner continued to pursue his application, arguing that a finding that he had been unlawfully held in prison beyond his release date would be the basis for his application to reduce his term of supervised release. Under 18 U.S.C. § 3583(e), a district judge who entered a defendant's sentence of imprisonment may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release." In *United States v. Johnson*, 529 U.S. 53, 60 (2000), this Court held that, although a sentencing judge is not *required* to reduce a term of supervised release, "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term." Petitioner accordingly argued that a ruling in his favor would likely cause the sentencing court to reduce his term of supervised release.

The district court nonetheless dismissed petitioner's habeas petition, finding that it could no longer "provide him with effective relief." Pet. App. 26a. Because the district court could not "predict

what weight, if any, the sentencing court [would] accord to a determination" that petitioner had been unlawfully over-incarcerated, the court was "not persuaded that a favorable decision . . . likely [would] result in his sentencing court shortening his supervised release term." Pet. App. 21a-22a. The court acknowledged that it was rejecting contrary decisions in the Second, Fifth, and Ninth Circuits. Pet. App. 25a.

3. The Third Circuit affirmed. Pet. App. 10a-12a. Dismissing the language from this Court's decision in *Johnson* as "nothing more or less than an appropriate reference to the discretion of a sentencing court to modify a term of supervised release" (Pet. App. 16a), the Third Circuit reasoned that petitioner's supervised release term was not a sufficient "collateral consequence" to satisfy Article III because the likelihood that a ruling in his favor would cause a reduction in his term of supervised release was too speculative (Pet. App. 12a-13a).

The Third Circuit acknowledged that its holding squarely conflicted with *Levine v. Apkar*, 455 F.3d 71, 77 (2d Cir. 2006), and *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005). Pet. App. 14-15. In those rulings, the Second and Ninth Circuits held that a post-conviction application is not moot when a judgment in the petitioner's favor would support a reduction in his term of supervised release.

REASONS FOR GRANTING THE WRIT

Petitioner seeks relief under 28 U.S.C. § 2241 because his sentencing court will give a determination that he was improperly denied release from prison at the proper time "great weight" in

deciding whether to reduce his term of supervised release. *United States v. Johnson*, 529 U.S. 53, 60 (2000). The Third Circuit nonetheless held that petitioner's application is moot, exacerbating an acknowledged division of authority over whether a petitioner's release from prison terminates his ability to challenge the legality of his detention beyond a certain date. This question arises frequently in the federal courts, and the split of authority on the issue is both entrenched and untenable. This case presents an ideal vehicle for resolving this conflict.

I. The Federal Courts Of Appeals Are Divided Over Whether A Post-Conviction Challenge To A Petitioner's Length Of Incarceration Becomes Moot When The Petitioner Is Released From Prison, But Still Seeks To Shorten His Term Of Supervised Release.

The federal circuits are irreconcilably fractured over whether an individual's release from prison moots an action when he intends to pursue a reduction in his term of supervised release. The conflict is widely recognized, and confusion over the question presented has led to divisions not only between, but within, the circuits. The federal courts have thoroughly ventilated the arguments on both sides of the issue, and continue to reach conflicting decisions despite repeatedly considering the question. The conflict in the lower courts is thus entrenched and ripe for this Court's intervention.

1. Three courts of appeals, including the Third Circuit, hold that a Section 2241 petition is moot once the petitioner has been released from prison,

notwithstanding the petitioner's intention to seek a reduction in his term of supervised release.

In this case, the Third Circuit concluded that petitioner's claim failed to raise a live controversy because he did not assert an injury redressable by the court. Pet. App. 9a (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)). In the Third Circuit's view, the possibility that the sentencing judge would subsequently modify petitioner's supervised release term based on a favorable decision on his habeas claim was "so speculative that any decision on the merits . . . would be merely advisory and not in keeping with Article III's restriction of power." Pet. App. 13a. The court's holding has been followed in several district court decisions,[2] and is consistent with prior Third Circuit rulings.[3]

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[2] *See Klein v. Hogson*, No. Civ. 3:CV-07-0701, 2009 WL 1044593, at *1 (M.D. Pa. Apr. 17, 2009); *Razzolli v. U.S. Parole Comm'n*, No. 3:CV-08-272, 2009 WL 1034483, at *2 (M.D. Pa. Apr. 16, 2009); *Cunningham v. Williamson*, No. CIV 3:CV-07-0977, 2009 WL 1044592, at *1 (M.D. Pa. Apr. 15, 2009).

[3] *See Scott v. Schuykill F.C.I*, 298 F. App'x 202 (3d Cir. 2008) (per curiam) ("[Petitioner's] § 2241 petition is moot because it is not redressable by a favorable judicial decision. . . . [Petitioner's] sentence ha[s] ended and his supervised release ha[s] begun."); *Williams v. Sherman*, 214 F. App'x 264 (3d Cir. 2007) (per curiam) ("A delayed commencement of supervised release due to an alleged wrongful calculation of good-conduct time cannot be redressed by a favorable judicial decision." (citing *United States v. Johnson*, 529 U.S. 53, 60 (2000)); *Hinton v. Minor*, 138 F. App'x 484 (3d Cir. 2005) (per curiam) ("[A]ny additional credit toward the custodial portion of [petitioner's] sentence would not shorten his period of supervised release. . . .

There is some, though not extensive, support for the Third Circuit's view in other circuits. The Eighth Circuit adopted the same rule, expressly overruling prior circuit precedent. *See Hohn v. United States*, 262 F.3d 811 (8th Cir. 2001) (overruling *Sesler v. Pitzer*, 110 F.3d 569 (8th Cir. 1997)). Although this Court vacated that decision on other grounds (*see Hohn v. United States*, 537 U.S. 801 (2002)),[4] the Eighth Circuit subsequently embraced the same conclusion in an unpublished opinion (*James v. Outlaw*, 142 F. App'x 274 (8th Cir. 2005) (per curiam) (finding Section 2241 petition moot because the petitioner "was released from prison while the appeal was pending, [and] return of the good-time credits at issue would have no effect on his . . . term of supervised release")).

Unpublished opinions of the Tenth Circuit also are consistent with the Third Circuit's holding in this case.[5] Similarly, a district court in the Fourth Circuit

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[G]iven [petitioner's] release from prison, we . . . dismiss his appeal as moot.").

[4] The Solicitor General confessed error in response to the petition for certiorari in *Hohn*, recognizing that the case was not moot for other reasons – for example, the petitioner's right to recover a special assessment imposed as a result of his conviction and the prospect that the conviction would be used to enhance a sentence if the petitioner were later convicted of another offense. *See* U.S. Br. 9-11, *Hohn v. United States*, 537 U.S. 801 (2002) (No. 01-1340). This Court, in turn, vacated and remanded the case for further consideration in light of the Solicitor General's brief. *Hohn v. United States*, 537 U.S. 801 (2002).

[5] *See Crawford v. Booker*, No. 99-3121, 2000 WL 1179782, at *2 (10th Cir. Aug. 21, 2000) (unpublished) (holding habeas

has recently held that a petitioner's release from prison moots his claim. *See Fulton v. Felt*, No. 5:06-cv-0010, 2009 WL 151084, at *2 (S.D. W. Va. Jan. 20, 2009) (mem.) ("[A]ssuming that Petitioner is correct and he actually did serve more time in custody than he should have, there would be no collateral consequence as he serves [a] term of supervised release . . . . [that] cannot be reduced.").

2. As the Third Circuit acknowledged, its ruling squarely conflicts with decisions of other courts of appeals. Pet. App. 12a. The Second, Ninth, and Eleventh Circuits would hold that this case is not moot.

In *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005), the Ninth Circuit held that a Section 2241 petition is not mooted by the petitioner's release from prison when he remains on supervised release. As here, the petitioner in *Mujahid* challenged the BOP's execution of his sentence, arguing that the Bureau had miscalculated his good-time credits and

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petition moot because court "could not shorten the length of [petitioner's] supervised release term . . . even if [his] legal argument was successful"), *followed in Fields v. Wiley*, No. 07-cv-01934-LTB-MEH, 2008 WL 1840725, at *4 (D. Colo. Apr. 23, 2008) (dismissing claim as moot because petitioner was released); *see also Wilcox v. Aleman*, 43 F. App'x 210 (10th Cir. 2002) (finding mootness where petitioner challenging release date had been released to supervised release). *But see Peterson v. Lappin*, No. 07-cv-00774-DME, 2007 WL 2332083, at *1 (D. Colo. Aug. 14, 2007) (rejecting mootness argument "[b]ecause the duration of supervised release could be affected by a favorable decision on the merits of [petitioner's] Habeas Application").

prolonged his incarceration. *Id.* In the view of the Ninth Circuit, "[t]he 'possibility' that the sentencing court would use its discretion to reduce a term of supervised release under 18 U.S.C. § 3583(e)(2) was enough to prevent the petition from being moot." *Id.* at 995 (citing *Gunderson v. Hood*, 268 F.3d 1149, 1153 (9th Cir. 2001)).

Mujahid has been repeatedly applied in the Ninth Circuit. *See Tablada v. Thomas*, 533 F.3d 800, 802 n.1 (9th Cir. 2008) (refusing to dismiss as moot petitioner's Section 2241 petition because he remained on supervised release); *Arrington v. Daniels*, 516 F.3d 1106, 1111 n.4 (9th Cir. 2008) (finding that for petitioners already released from prison, "relief may still be available in the form of modification, amendment, or termination of their supervised release"); *Serrato v. Clark*, 486 F.3d 560, 565 (9th Cir. 2007) ("Because 18 U.S.C. § 3583(e)(2) gives the sentencing court the power to reduce a term of supervised relief . . . [petitioner's] appeal is not moot.").

The Second Circuit has also held that a "case or controversy exists" so long as a petitioner remains on supervised release. In *Levine v. Apker*, 455 F.3d 71, 77 (2d Cir. 2006), the petitioner challenged the BOP's refusal to transfer him to a community correction center until he had completed ninety percent of his sentence. *Id.* While the case was pending on appeal, he was released. The Second Circuit held that his petition was not moot because the district court could

modify his term of supervised release in light of its holding. *Id.*[6]

The Eleventh Circuit reached the same conclusion in *Dawson v. Scott*, 50 F.3d 884, 886 (11th Cir. 1995). The court recognized that "supervised release . . . is part of [a] sentence and involves some restrictions upon . . . liberty," and held that "[b]ecause success in [a Section 2241 petition] could alter the supervised release portion of [a] sentence, [a petitioner's] claim is not moot." *Id.* Contrary to the Third Circuit, the Eleventh Circuit has reaffirmed that precedent in the wake of this Court's ruling in *Johnson*. *See Mitchell v. Middlebrooks*, 287 F. App'x

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[6] Petitioner's case is *a fortiori* under the Second Circuit's holding in *Levine*. A judgment that petitioner was not timely released from prison into society would present a substantial equitable basis for a reduction in his term of supervised release. The petitioner in *Levine*, by contrast, alleged that he had not been timely released from prison into "community confinement," a status that involves significantly greater governmental oversight and that, as a consequence, presents a less substantial equitable ground for a reduction in the term of supervised release.

Of note, by granting this petition, the Court would help to resolve the related circuit conflict over whether a claim of improper denial of release to community confinement is saved from mootness by the prospect of a reduction in the petitioner's term of supervised release. Three circuits hold, in conflict with the Second Circuit, that such a claim is moot because a reduction in supervised release will not remedy "foregone 'opportunities to transition into the community.'" *Demis v. Sniezek*, 558 F.3d 508, 515 (6th Cir. 2009); *see also Semulka v. Bureau of Prisons*, No. 08-3404, 2009 WL 641217 (3d Cir. Mar. 13, 2009) (per curiam); *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008).

772, 775 (11th Cir. 2008) ("[*Johnson*] recognized that sentencing courts have the authority both to modify conditions of supervised release and to terminate supervised release . . . . *Johnson* did not, therefore alter our holding in *Dawson* that an appeal is not moot where a former prisoner is still serving a term of supervised release.").

3. Several circuits have issued inconsistent opinions on the question presented. In *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006), the Fifth Circuit held that an application like petitioner's is not moot, reasoning that "the possibility that the district court may alter [the petitioner's] period of supervised release pursuant to 18 U.S.C. § 3583(e)(2), if it determines that he has served excess prison time, prevents [his] petition from being moot." *Id.* Multiple district court rulings in the Fifth Circuit follow that rule.[7]

Another Fifth Circuit panel reached a contrary result, however. In *Lawson v. Berkebile*, 308 F. App'x 750 (5th Cir. 2009) (per curiam), the court dismissed as moot a Section 2241 petition challenging the BOP's refusal to grant an inmate early release. The

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[7] *See, e.g.*, *Whitehurst v. Burks*, No. H-08-2473, 2009 WL 926995, at *4 (S.D. Tex. Apr. 1, 2009); *Floyd v. Berkebile*, No. 3:05-CV-2489-M, 2008 WL 153494, at *1 (N.D. Tex. Jan. 15, 2008) ("The Court declines to dismiss the case as moot" because "[t]he credit against the federal sentence that the court has determined Petitioner is entitled to could support an alteration of the term of his supervised release."); *Alford v. Reece*, No. 5:06cv95DCB-MTP, 2007 WL 3124541, at *2 n.1 (S.D. Miss. Oct. 19, 2007) ("If . . . petitioner is on supervised release, then his petition might not be moot.").

court distinguished that court's prior ruling in *Pettiford* on the supposed ground that the district court reviewing Lawson's habeas petition was "without jurisdiction to determine, under 18 U.S.C. § 3583, whether he served excess prison time; that determination [was] to be made by the sentencing court." *Id.* at 752. But that is a false distinction because the same was true in *Pettiford*. *See* Report and Recommendation of the Magistrate Judge, *Johnson v. Pettiford*, No. 06708097 (S.D. Miss. July 17, 2007) (noting that petitioner was not sentenced in the same district court that was reviewing his habeas claim).

One district court in the Fifth Circuit has similarly declined to follow *Pettiford*. In *Nolan v. Reece*, No. 03198-095, 2006 WL 1674287 (S.D. Miss. June 13, 2007), the court expressed disagreement with the decision, finding that "the relevant statutes and rules for modification of a term of supervised release are directed toward the sentencing court or the court conferred with jurisdiction over the prisoner's term of supervised release, not the court in which the Petitioner chooses to file a section 2241 habeas petition." *Id.* at *1.

Citing *Johnson*, the Sixth Circuit has similarly noted in unpublished opinions that a challenge to an expired term of incarceration would be moot despite the defendant's ongoing supervised release term. *United States v. Wilson*, 87 F. App'x 553, 556 (6th Cir. 2004), *followed in United States v. Lewis*, 166 F. App'x 193 (6th Cir. 2006). But previous published circuit precedent suggested that continued post-release supervision *could* preclude a finding of

mootness. *See Diaz v. Kinkela*, 253 F.3d 241 (6th Cir. 2001).[8]

4. The division of authority over the question presented is intolerable. As the law stands now, identically situated petitioners have their habeas petitions decided or dismissed purely based on the happenstance of the circuit in which the case arises. Indeed, because a petitioner's motion for a reduction in the term of his supervised release must be filed in the sentencing court (*see* 18 U.S.C. § 3583(a), (c)), individuals within a single courthouse (or even courtroom) may receive disparate treatment depending on the court that resolved the antecedent habeas petition.

This case is also an ideal vehicle in which to resolve the recurring circuit conflict raised by the question presented. The issue was squarely presented to the Third Circuit, which resolved the

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[8] In *Diaz*, the Sixth Circuit held moot a habeas petition challenging the imposition of "bad acts" time by a defendant on post-release restriction. But the court premised its holding on the fact that the state statute at issue had already been declared unconstitutional. Though it found that the petitioner had not properly raised the question, the court noted that the "[p]etitioner's claim that he continues to suffer collateral consequences of the 'bad acts' time" – namely that he remained on post-release restriction – "may have afforded him standing" had the statute at issue not been previously invalidated. *Diaz*, 253 F.3d at 244. Additionally, in *Demis* (*see supra* at 10 n.5), the Sixth Circuit noted that "shortening the term of supervised release may well be appropriate for a petitioner who challenges the *length* of his sentence" (558 F.3d at 515), thereby suggesting that it would be inclined to follow the Ninth, Second and Eleventh Circuits on the question presented.

case based only on this ground. The magistrate's recommendation moreover demonstrates that petitioner's underlying Section 2241 application is meritorious. *See* Pet. App. 48a-49a.

II. The Third Circuit's Ruling Is Erroneous.

Certiorari also is warranted because the ruling below conflicts with this Court's precedents. A case presents a justiciable controversy so long as the plaintiff suffers an "'actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). Therefore, a case is moot only when the parties no longer have "a 'personal stake in the outcome' of the lawsuit" (*Lewis*, 494 U.S. at 478 (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983))), or when the court can no longer "grant 'any effectual relief whatever'" (*Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895))).

Based on these well-established principles, petitioner's habeas claim presents a live controversy. The restrictions on liberty attendant to petitioner's term of supervised release, which petitioner claims is too long, constitute an "actual injury traceable to the defendant." *Spencer*, 523 U.S. at 7. Further, because the habeas court can fashion "*some* form of meaningful relief" (*Church of Scientology*, 506 U.S. at 12 (emphasis in original)) – namely, a favorable judgment that will aid petitioner in his § 3583(e)(1) motion for a reduction in his term of supervised release – petitioner's injury is redressable. Lest there be any doubt, petitioner's claim should be justiciable

because a decision to the contrary would insulate the BOP's "patently wrong" policymaking decisions (Pet. App. 39a) from judicial review.

A. Petitioner Is Suffering An Actual Injury Traceable To The Defendant.

1. In *Spencer v. Kemna*, this Court observed that "[a]n incarcerated convict's (or a parolee's) challenge to the validity of his conviction *always* satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of . . . parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." 523 U.S. at 7 (emphasis added). The "restriction imposed" by petitioner's supervised release term constitutes a "concrete injury" for two reasons.

First, as this Court has recognized, supervised release is a replacement for parole. *See Johnson v. United States*, 529 U.S. 694, 696-97 (2000); *Gozlon-Peretz v. United States*, 498 U.S. 395, 400-01 (1991). The primary difference between supervised release and parole is merely that with the former, "the sentencing court, rather than the Parole Commission, . . . oversee[s] the defendant's postconfinement monitoring." *Gozlon-Peretz*, 498 U.S. at 401. Indeed, like inmates on parole, inmates on supervised release must "abide by certain conditions, some specified by statute and some imposable at the court's discretion." *Johnson*, 529 U.S. at 697. Petitioner is living a life under constant supervision, including restrictions on his ability to travel outside of the district of his sentencing. Pet. App. 55a-57a.

Second, petitioner's current service of his supervised release term is "traceable to" his unlawful incarceration. *Spencer*, 523 U.S. at 7. Had the BOP granted petitioner early release upon completion of his second drug treatment program, he would be a year closer to completing his term of supervised release. But because the BOP denied early release based on an invalid rule, petitioner will continue to serve his term of supervised release for that full year.

2. None of the Third Circuit's reasons for failing to follow this straightforward reasoning withstands scrutiny.

a. The Third Circuit concluded that petitioner's overly long supervised release term could not constitute an "actual injury" because it does not constitute a "continuing injury, or collateral consequence," of his excessive prison term. Pet. App. 9a. But as the Third Circuit itself recognized, a habeas petitioner needs to rely on collateral consequences only "once [his or her] sentence has *expired*." *See* Pet. App. 9a (emphasis added). When a person is still on supervised release, his sentence has not yet expired. Indeed, this Court has defined collateral consequences as distinct from the concrete injuries posed by incarceration and parole: "Once the convict's sentence has expired, . . . some concrete and continuing injury *other than* the now-ended incarceration or parole – some 'collateral consequence' . . . must exist." *Spencer*, 523 U.S. at 7. Accordingly, when, as here, a habeas petitioner is still serving a term of supervised release, he is suffering a "concrete injury" that renders collateral consequences unnecessary. *See United States v. Verdin*, 243 F.3d 1174, 1178 (9th Cir. 2001); *see also*

United States v. Blackburn, 461 F.3d 259, 269 (2d Cir. 2006) (Sotomayor, J., dissenting) ("*Spencer* does not control the resolution of this case because [petitioner's] entire sentence has not expired.").[9]

b. Even if petitioner were required to show a collateral consequence of his unlawful incarceration, he has done so. A collateral consequence is nothing more than a "concrete and continuing injury other than the now-ended incarceration." *Spencer*, 523 U.S. at 7. Thus, the Court has held that a petitioner whose term of incarceration has expired may challenge his or her conviction because it renders the petitioner incapable of, among other things, "engag[ing] in certain businesses" and "serv[ing] as a juror." *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968). *See also Fiswick v. United States*, 329 U.S. 211, 221-23 (1946) (deeming the possibility of deportation a collateral consequence).

Petitioner's supervised release term imposes such "concrete disadvantages or disabilities." *Spencer*, 532 U.S. at 8. For example, petitioner must submit to periodic drug testing and restrictions on his travel. *See* Pet. App. 55a-56a; *Jago v. Van Curen*, 454 U.S. 14, 21 n.3 (1981) (live controversy exists where petitioner's "release is conditioned upon . . . compliance with terms that significantly restrict his

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[9] The Third Circuit also noted that petitioner's habeas petition "d[oes] not challenge the validity" of his term of supervised release. Pet. App. 10a. This is, of course, true, but it also is irrelevant. Petitioner cannot challenge his supervised release term in this Section 2241 petition because the Bureau of Prisons is not his custodian on supervised release.

freedom," such as receiving "written permission before changing his residence, changing his job, or traveling out of state"); *see also Cavins v. Lockyer*, 232 F. App'x 655 (9th Cir. 2007) (habeas petition not moot because of potential collateral consequences from petitioner's exercise of his right to travel). These restrictions will continue for an extra year because of petitioner's unlawful incarceration. The Third Circuit's view that these "disadvantages and disabilities" are not collateral consequences of that unlawful incarceration because of the allegedly low "'likelihood' that a favorable decision would redress" them (Pet. App. 11a) confuses the distinct issues of injury and redressability.

B. Petitioner's Injury Is Redressable By A Favorable Habeas Ruling.

Under longstanding principles of mootness, petitioner's claims are redressable by a favorable ruling.

1. Petitioner satisfies the redressability requirement that he continue to assert a "legally cognizable interest in the outcome" of the case. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (quoting *County of L.A. v. Davis*, 440 U.S. 625, 631 (1979)). It is sufficient, as is the case with declaratory actions, that the remedy he seeks will be useful only in future litigation. *Cf. Powell v. McCormack*, 395 U.S. 486, 499 (1969). Only when it becomes "impossible for the court to grant 'any effectual relief whatever to the prevailing party'" does a ruling become advisory and thus moot. *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653).

Such is not the case here. A favorable ruling on petitioner's habeas corpus petition would significantly increase petitioner's chances of shortening his term of supervised release. That is so because this Court has recognized that "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term," and a sentencing court should take that fact into consideration in deciding whether it will modify or terminate an individual's term of supervised release. *United States v. Johnson*, 529 U.S. 53, 60 (2000). A favorable ruling under Section 2241 will allow petitioner to prove indisputably to the sentencing court that he was unlawfully over-incarcerated. *See Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006); *Mujahid v. Daniels*, 413 F.3d 991, 994-95 (9th Cir. 2005).

2. It is irrelevant, as the Third Circuit held, that the sentencing court is not *required* to change petitioner's sentence in the event of a favorable ruling on his Section 2241 petition. *See* Pet. App. 12a-13a. In the analogous situation of deciding whether to remand a case to the sentencing court, appellate courts have uniformly held that a live controversy persists as long as the lower court retains the power to modify the sentence on remand.[10] That is, in fact,

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[10] *See, e.g.*, *United States v. Trotter*, 270 F.3d 1150, 1152-53 (7th Cir. 2001) (recognizing that although this Court held in *Johnson* that "a person held too long in prison" is not automatically "given credit against his term of supervised release," the fact that a "district judge would have discretion to shorten the term of supervised release" is enough to keep the controversy live); *see also, e.g.*, *United States v. Cruzado-*

Laureano, 527 F.3d 231, 234 n.1 (1st Cir. 2008) ("Although [the defendant] has completed serving his term of imprisonment, this appeal has not become moot . . . . [I]f [the defendant] were to succeed with a claim that his sentence was improperly calculated, his three-year period of supervised release could be reduced on remand."); *United States v. Maken*, 510 F.3d 654, 656 n.3 (6th Cir. 2007); *United States v. Vera-Flores*, 496 F.3d 1177, 1180 (10th Cir. 2007); *Serrato v. Clark*, 486 F.3d 560, 565 (9th Cir. 2007) (holding habeas corpus petition not moot "[b]ecause 18 U.S.C. § 3583(e)(2) gives the sentencing court the power to reduce a term of supervised release" (footnote omitted)); *United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006); *United States v. Larson*, 417 F.3d 741, 747 (7th Cir. 2005) ("[T]he case is not moot if the judge on remand would have discretion to shorten [the defendant's] supervised release."); *United States v. McCoy*, 313 F.3d 561, 564 (D.C. Cir. 2002) (finding petitioner's action not mooted by her release from prison because resentencing was "relevant to [defendant's] supervised release" and "clearly could benefit [her]," even though it may not); *United States v. Verdin*, 243 F.3d 1174, 1178-79 (9th Cir. 2001) ("Verdin . . . is in the first year of a three-year term of supervised release, which could be affected upon resentencing. If he were to prevail, in decreasing his total offense level, he *could* be resentenced to a shorter period of supervised release. . . . Thus, Verdin has a 'personal stake in the outcome' of this appeal, and it is not moot." (emphasis added)); *Dawson v. Scott*, 50 F.3d 884, 886 n.2 (11th Cir. 1995) ("Because success for Dawson *could* alter the supervised release portion of his sentence, his appeal is not moot." (emphasis added)); *cf. United States v. Blackburn*, 461 F.3d 259 & n.2 (2d Cir. 2006) (holding to the contrary, but noting that "we may assume that in the typical case . . . an appellate court could fairly deem it likely enough that, if the merits issue were decided in favor of the defendant, the district court would use its discretion on remand to modify the length of a term of supervised release" and that the holding in the case "is quite narrow"); *Swaby v. Ashcroft*, 357 F.3d 156, 161 (2d Cir. 2004) ("[W]ere we to rule in petitioner's favor, he would have a *chance* at reentering the United States. This chance is sufficient to give petitioner a

the prevailing rule in the Third Circuit. *See United States v. Jackson*, 523 F.3d 234, 241 (3d Cir. 2008) ("[T]he possibility of a credit for improper imprisonment against a term of supervised release is sufficient to give [the court] jurisdiction."); *see also United States v. Cottman*, 142 F.3d 160 (3d Cir. 1998) (rejecting assertion of mootness because over-incarceration "would likely merit a credit against [petitioner's] period of supervised release").

The fact that petitioner will file his motion under 18 U.S.C. § 3583(e)(2) in his sentencing court, rather than the case being directly remanded to the sentencing court, should make no difference. The likelihood that a favorable decision will redress petitioner's injuries cannot turn solely on the "fortuitous occurrence" of whether his sentencing court is also his habeas court. *Mujahid*, 413 F.3d 991.

3. The Third Circuit also erred in opining that the prospect that petitioner's sentencing court will reduce his term of supervised release is too speculative to give rise to a live case or controversy. *See* Pet. App. 11a-12a. The Third Circuit correctly noted that *Spencer* requires that an asserted injury be "likely to be redressed by a favorable judicial decision." *Spencer*, 523 U.S. at 7 (quoting *Lewis*, 494 U.S. at 477). But the Third Circuit dramatically misapplied that test to the situation here.

This Court in *Spencer* rejected four potential collateral consequences as too remote to avoid a

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personal stake in the litigation that presents a live case or controversy." (emphasis added and quotations omitted)).

finding of mootness. *See Spencer*, 523 U.S. at 14-16. These injuries, however, were far less likely to be redressed by a favorable ruling than petitioner's continuing, excessive term of supervised release. Two of the four harms were hypothetical and contingent on Spencer committing a crime in the future; another was based on the exceedingly unlikely possibility that he would be called as a witness in a future criminal trial. *See id.* at 15-16. And although Spencer was going to face a parole proceeding (he had already been convicted of another crime), an analysis of the relevant Missouri parole laws made clear that the final asserted injury – revocation of parole in the case before this Court – would likely have no effect whatsoever on a future parole proceeding. *Id.* at 14.

By contrast, petitioner's ability to receive redress through a § 3583(e) motion based on a holding that he was in fact unlawfully incarcerated for too long is not a mere "possibility," but a probability. Recognizing that "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term," this Court has admonished sentencing courts to take these considerations into account when making sentencing determinations, *Johnson*, 529 U.S. at 60 – which they have done, *see, e.g.*, *United States v. Norgaard*, 357 F. Supp. 2d 1274, 1276-77 (W.D. Wash. 2005) (factoring in equitable considerations in deciding to shorten term of supervised release).

Moreover, the circumstances specific to this case make petitioner an ideal candidate for early release. He is in perfect compliance with the terms of his supervised release. Given the length of his illegal overstay in prison, a favorable ruling on his Section

2241 petition would make it likely that a sentencing court would find, based on his model behavior and the equitable considerations outlined in *Johnson*, that petitioner's term of supervised release should be shortened.

C. Dismissing The Case In This Posture As Moot Would Insulate The BOP's "Patently Wrong" Arguments From Judicial Review.

Almost immediately after the magistrate judge recommended that petitioner's habeas claims be granted, the BOP released petitioner and filed a Notice of Suggestion of Mootness. Pet. App. 5a. By granting the BOP's motion and deeming petitioner's habeas petition moot, the district court and court of appeals permitted BOP effectively to shield what the magistrate judge believed were "patently wrong" actions from an adverse judgment. Pet. App. 39a.

This case is not the only instance of the BOP taking actions that insulate its policies from judicial scrutiny. For example, in January 2005, the BOP unilaterally terminated the federal boot camp program, one of only two programs providing for sentence reductions. DIST. OF OR., FED. PUB. DEFENDER, UPDATE ON BOP ISSUES AFFECTING CLIENTS BEFORE AND AFTER SENTENCING 5 (2007), *available at* http://fd.org/pdf_lib/SAW%20Bureau.pdf. Almost immediately, a district court enjoined the termination, finding a likely violation of both the APA and the Ex Post Facto Clause. *See Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005). In response, the BOP began a "concerted policy of mooting cases" by transferring prisoners who filed

suits to state boot camps. *See* DIST. OF OR., *supra*, at 6. Similarly, in *Demis v. Sniezek*, the BOP attempted to dismiss a habeas petition challenging the BOP's refusal to transfer a prisoner to a CCC. 558 F.3d 508, 511 (2009). After the magistrate judge recommended denying the BOP's motion on grounds that the applicable BOP regulations "'contradict or ignore the will of Congress,'" the BOP transferred the petitioner to a CCC, purportedly mooting the case. *Id.*

Whatever the BOP's motivations for voluntarily granting relief in these cases, the effects are clear, if the Third Circuit's decision here is correct. The BOP's actions manufacture mootness, shield the BOP from adverse judgments, and leave the BOP free "'to return to [its] old ways.'" *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). This Court should not tolerate such manipulations of the federal courts' Article III authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 15, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT.

John BURKEY, Appellant
v.
Helen J. MARBERRY, Warden FCI McKean.
No. 07-4782.

Argued on Nov. 20, 2008.
Filed Feb. 18, 2009.

OPINION OF THE COURT

RENDELL, Circuit Judge.

The question presented by this appeal is whether appellant John Burkey's release from Bureau of Prisons ("BOP") custody caused his pending habeas corpus petition—which challenged the BOP's failure to grant him early release—to be moot because it no longer presented a case or controversy under Article III, § 2, of the Constitution. We agree with the District Court that Burkey's petition is moot because his assertion of "collateral consequences" is insufficient. We will therefore affirm.

BACKGROUND

In 1996, Burkey was serving a sentence for federal controlled substances convictions at the Federal Correctional Institution at McKean in Bradford,

Pennsylvania. The BOP determined that he was eligible for early release pursuant to 18 U.S.C. § 3621(3)(2)(B),[1] because he had completed a residential drug treatment program. Burkey received his early release credit, and was released to serve his term of supervised release.

While on supervised release, Burkey committed new controlled substances crimes and was rearrested. In July of 2003, he was sentenced in United States District Court for the Northern District of Ohio to a term of imprisonment of 57 months, to be followed by 3 years of supervised release. A few weeks later, the sentencing court imposed a three-month supervised release violator term, to be served concurrent with the 57-month term of imprisonment.

Burkey returned to prison and participated once again in the drug treatment program, expecting to again qualify for early release. However, the BOP, relying on a recently adopted rule, namely, Paragraph 5(c) of Program Statement 5331.01,[2] determined that

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[1] The statute provides:

> **Period of Custody** ... The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2)(B).

[2] Paragraph 5 of Program Statement 5331.01 states in pertinent part:

he was ineligible for early release because he had previously received an early release credit under the

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> **5. EARLY RELEASE CRITERIA.** In this section, we briefly describe the criteria that an inmate must meet to be eligible for early release. For details on the early release criteria, see [28 C.F.R. § 550.58].
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> * * * *
>
> **a. Eligibility Criteria for Early Release.** Inmates must meet the following eligibility criteria to earn early release:
>
> * * * *
>
> **Residential Drug Abuse Program Completion.** To earn early release, an inmate must complete all required components of the residential drug abuse program (RDAP) successfully. RDAP completion is defined in the Psychology Services Manual.
>
> * * * *
>
> **c. Inmates Ineligible for Early Release.** The Bureau has determined that the following categories of inmates **are not eligible for early release:**
>
> * * * *
>
> **Prior Early Release Granted.** Inmates may earn an early release for successful RDAP completion only once. Inmates returning on supervised release violations and/or inmates who are sentenced for new offenses are not eligible for early release if they received it previously....

Bureau of Prisons Program Statement 5331.01, at ¶ 5 (September 29, 2003, *as corrected*, October 3, 2003).

statute.

Burkey pursued his administrative remedies through the BOP, attempting at first to raise an *ex post facto* argument. The Warden denied him relief and he lost his appeal at the Regional level. Upon denial of that appeal, he filed a Central Office Administrative Remedy Appeal, arguing for the first time that Paragraph 5(c) of Program Statement 5331.01 was issued in violation of the Administrative Procedures Act and thus was invalid. In March of 2006, Burkey's Central Office Administrative Remedy Appeal was denied on the basis that his *ex post facto* claim had no merit. The APA claim was not addressed.

In May of 2006, Burkey filed a pro se petition for writ of habeas corpus, 28 U.S.C. § 2241, in United States District Court for the Western District of Pennsylvania, where he was confined. He challenged the BOP's determination that he was not eligible for early release under 18 U.S.C. § 3621(e)(2)(B), urging that Paragraph 5(c) of Program Statement 5331.01 was promulgated in violation of the Administrative Procedures Act, 5 U.S.C. § 553, and was, therefore, invalid. Burkey asked to be released from detention. The Federal Public Defender was appointed to represent him.

In August of 2007, the Magistrate Judge issued a thorough Report and Recommendation, concluding that the BOP had violated the APA. The APA provides that an agency may not adopt a rule without providing prior notice through publication in the

Federal Register and comment. 5 U.S.C. § 553(b), (c). The Magistrate Judge reasoned that Paragraph 5(c) of Program Statement 5331.01 was neither an exempt "interpretative rule" nor an exempt general statement of policy. *See Dia Navigation Co., Ltd. v. Pomeroy*, 34 F.3d 1255, 1264 (3d Cir. 1994). It was instead a legislative rule, *see id.*, subject to the APA, and the BOP could not avoid the APA's requirements by placing a legislative rule in a Program .Statement, instead of first publishing it in the Federal Register. The Magistrate Judge recommended that Burkey's request for habeas corpus relief be granted because he had completed the residential drug treatment program.

On September 7, 2007, the BOP released Burkey from custody, nine days before his statutory release date of September 16, 2007. It then filed in this case a Notice of Suggestion of Mootness, contending that, because Burkey had, through his release, achieved the object of his habeas corpus petition, his case was moot. Burkey filed a written response, and urged that his petition was not moot because, if the District Court would issue an order approving and adopting the Magistrate Judge's Report and Recommendation, he then would be able to argue to the sentencing court in Ohio that his supervised release term should be shortened in light of his having been improperly denied early release from prison.[3]

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[3] Pursuant to 18 U.S.C. § 3583(e), only the sentencing court has the authority to modify Burkey's term of supervised release. *See generally Gozlon-Peretz v. United States*, 498 U.S. 395, 400-01 (1991) (under Sentencing Reform Act sentencing court oversees "post[-]confinement monitoring" and may "terminate, extend, or

The District Court dismissed Burkey's habeas corpus petition as moot. The court observed that, to avoid a finding of mootness, Burkey would have to demonstrate that the delayed commencement of his supervised release term was likely to be redressed by a favorable judicial decision, *Spencer v. Kemna,* 523 U.S. 1, 7 (1998). The court concluded that it was "pure speculation that a favorable decision from this Court would 'likely' result in [Burkey's] sentencing court reducing or terminating his supervised release term under Section 3583(e)." *Burkey v. Lappin,* 2007 WL 4480188, at * 2 (W.D. Pa. December 14, 2007). The District Court did not believe it could predict what the sentencing court would do in Burkey's case, and thus it could not conclude that the relief sought likely would be granted.

The District Court rejected precedent in the Second and Ninth Circuits, *Levine v. Apker,* 455 F.3d 71 (2d Cir. 2006), and *Mujahid v. Daniels,* 413 F.3d 991 (9th Cir. 2005), which permit a case to continue when there is only a "possibility" that a court might modify a term of supervised release, and concluded that more is required to maintain a case or controversy under Article III. The District Court also referred to the view expressed by the Supreme Court in *United States v. Johnson,* 529 U.S. 53 (2000), that incarceration and supervised release serve distinct

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alter the conditions of the term of supervised release prior to its expiration" pursuant to § 3583(e)); *United States v. Lussier,* 104 F.3d 32, 34-35 (2d Cir. 1997) (under § 3583(e) sentencing court retains authority to revoke, discharge, or modify terms and conditions of supervised release following its initial imposition of supervised release term)

objectives and are not to be viewed as interchangeable punitive measures. *Burkey*, 2007 WL 4480188, at *2 (citing *Johnson*, 529 U.S. at 57-58). This, the District Court reasoned, detracted from the likelihood that the sentencing court would modify Burkey's term of supervised release based on his having been in prison longer than he perhaps should have been as a result of the BOP's APA violation.

Burkey appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. *United States v. Cepero*, 224 F.3d 256, 264-65 (3d Cir. 2000) (certificate of appealability not required to appeal from denial of section 2241 petition). The standard of review over the District Court's mootness determination is plenary. *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 284 (3d Cir. 2004). Insofar as Burkey was in BOP custody when he filed his habeas corpus petition under 28 U.S.C. § 2241, he has satisfied the "in custody" jurisdictional requirement, *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968), and he appropriately filed his habeas corpus petition in the district of confinement and named the Warden as the respondent, *Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004).

DISCUSSION

A challenge to the BOP's execution of a sentence is properly brought under 28 U.S.C. § 2241. *Woodall v. Federal Bureau of Prisons*, 432 F.3d at 235, 241-43 (3d Cir. 2005); *Coady v. Vaughn*, 251 F.3d 480, 485 (3d Cir. 2001). The BOP waived any exhaustion of administrative remedies argument it might have had concerning the APA claim insofar as 28 C.F.R.

§ 542.15 prohibits an inmate from raising on appeal an issue that was not raised at the initial and intermediate levels of the administrative remedy process. Burkey's habeas corpus petition sought release from prison based on the invalidity under the APA of the Program Statement denying him early release. That relief was afforded him when, on the Magistrate Judge's recommendation, the BOP released him in September of 2007 to begin serving his 3-year term of supervised release. Given this, is a case or controversy still presented? We conclude the answer is no, and, therefore, Burkey's habeas corpus petition is moot.

Under Article III of the Constitution, a federal court may adjudicate "only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). "To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 750-751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-473 (1982)). Article III denies the District Court the power to decide questions that cannot affect the rights of litigants before it, and confines it to resolving live controversies "admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937).

The case or controversy requirement continues through all stages of federal judicial proceedings, trial and appellate, and requires that parties have a personal stake in the outcome. *Lewis,* 494 U.S. at 477-478. "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer*, 523 U.S. at 7 (quoting *Lewis,* 494 U.S. at 477). Incarceration satisfies the case or controversy requirement; it is a concrete injury caused by a conviction and is likely to be redressed by invalidation of the conviction. *Id.* Once a sentence has expired, however, some continuing injury, also referred to as a collateral consequence, must exist for the action to continue. *Id.*

Following *Sibron v. New York*, 392 U.S. 40 (1968), the Supreme Court "abandoned all inquiry into the actual existence of collateral consequences," *id.* at 55, 88 S.Ct. 1889, and "proceeded to accept the most generalized and hypothetical of consequences as sufficient to avoid mootness" in a challenge to a conviction. *Spencer,* 523 U.S. at 10. In *Lane v. Williams,* 455 U.S. 624 (1982), the Court declined to extend the presumption of collateral consequences in the context of a challenge to a mandatory parole violator term when, during the pendency of the litigation, the term had expired. *Id.* at 632-33. Most recently in *Spencer*, the Court "decline[d] to presume that collateral consequences adequate to meet Article III's injury-in-fact requirement resulted from petitioner's parole revocation," *Spencer*, 523 U.S. at 14, once that term had expired. As in *Lane*, the fact that

the parolee was not challenging the validity of his conviction factored heavily in the decision not to presume collateral consequences.

Thus, collateral consequences will be presumed when the defendant is attacking his conviction while still serving the sentence imposed for that conviction, but we also have held that they will be presumed where the defendant is attacking that portion of his sentence that is still being served. *See, e.g., United States v. Jackson*, 523 F.3d 234, 242 (3d Cir. 2008). In *Jackson*, we held that collateral consequences are presumed where the appellant was still serving a term of supervised release and her challenge was to the reasonableness of the supervised release term. *Id.* Where, however, the appellant is attacking a sentence that has already been served, collateral consequences will not be presumed, but must be proven. *See United States v. Cottman*, 142 F.3d 160, 165 (3d Cir. 1998).

Burkey has served his sentence but remains subject to a 3-year term of supervised release. However, he did not challenge the validity or reasonableness of that term in his habeas corpus petition, as did the appellant in *Jackson*. His challenge was more remote, attacking only what the BOP had done, and urging it as the basis for the sentencing court to now afford him relief against an indisputably valid term of supervised release. In such circumstances, he must demonstrate that collateral consequences exist; they will not be presumed. *Cf. Jackson*, 523 F.3d at 241. (*Cottman* held that collateral consequences will not be presumed when "[a] defendant who is serving a term of supervised release

... challenges only his completed sentence of imprisonment").

Even though collateral consequences are not presumed, a petitioner may still avoid a finding of mootness if he can show a continuing injury, or collateral consequence, that is sufficient. *Spencer,* 523 U.S. at 14. The delayed commencement of Burkey's validly imposed term of supervised release is, he alleges, his "continuing injury," but this is insufficient for mootness purposes in his case, given his release from BOP custody. We reach this conclusion because the Supreme Court, in *Lewis* and *Spencer,* addressed the issue of collateral consequences in terms of the "likelihood" that a favorable decision would redress the injury or wrong. In fact, in *Spencer,* the Court rejected numerous collateral consequences proffered by the petitioner because they were no more than "a possibility rather than a certainty or even a probability," or pure speculation. 523 U.S. at 14-16.[4]

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[4] The petitioner in *Spencer* alleged that the revocation of his parole could be used to his detriment in a future parole proceeding, but the Court rejected this as "a possibility rather than a certainty or even a probability" because, under Missouri law, a prior parole revocation is but one factor among many to be considered by the parole authority. *Spencer,* 523 U.S. at 14. The petitioner also contended that the revocation could be used to increase his sentence in a future sentencing proceeding. The Court rejected this because it was contingent upon the speculative possibility that the petitioner would violate the law, get rearrested, and be convicted. *Id.* The Court rejected petitioner's third and fourth contentions – that the finding of a parole violation for forcible rape and armed criminal action could be used to impeach him should he appear as a witness or litigant in a future criminal or civil proceeding, or could be used against

The "likely" outcome here is not that the District Court's order will cause the sentencing court in Ohio to reduce Burkey's term of supervised release. Quite apart from the instant petition, Burkey has the right to file in the sentencing court a motion for termination of his term of supervised release pursuant to 18 U.S.C. § 3583(e), because he has served one year of his term. Under 18 U.S.C. § 3583(e)(1), a defendant who has completed one year of his supervised release term may file a motion, and the sentencing court has the authority to terminate a defendant's supervised release obligations "at any time after the expiration of one year ... if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." 18 U.S.C. § 3583(e)(1).

However, the District Court reasoned that Burkey's ability to obtain modification under the supervised release statute turns on a discretionary decision of the sentencing court, which must consider many factors pursuant to 18 U.S.C. § 3553(a), including those which bear directly on the objectives of supervised release. From a practical, and legal, standpoint, we too doubt whether a sentencing judge, having imposed a specific term of imprisonment and supervised release, would alter his view as to the propriety of that sentence because the BOP required the defendant to serve it.

The concept of interchangeability of supervised release for incarceration was specifically rejected by the Supreme Court in *Johnson*, 529 U.S. at 59-60, as

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him directly pursuant to Federal Rule of Evidence 405 – as, again, purely a matter of speculation. *Id.* at 15-16.

the District Court noted. The probability that the sentencing court here would reduce Burkey's term of supervised release—especially given his past recidivism—as an equalizer for his incarceration, has not been established. As the applicable § 3553(a) factors indicate, a decision under § 3583(e) generally is more directly influenced by the particular defendant and the underlying conduct that formed the basis for the term of supervised release. *Cf. Lane*, 455 U.S. at 632-33 (observing that discretionary decisions made by sentencing court "are more directly influenced by [ ] the underlying conduct that formed the basis for the parole violation").

The possibility that the sentencing court will use its discretion to modify the length of Burkey's term of supervised release under 18 U.S.C. 3583(e), which it may do as long as the reason for doing so is not to offset excess prison time, *Johnson*, 529 U.S. at 57-60,[5] is so speculative that any decision on the merits by the District Court would be merely advisory and not in keeping with Article III's restriction of power. *See Flast v. Cohen*, 392 U.S. 83, 96 n. 14 (1968) (noting long established rule against advisory opinions). The

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[5] In *Johnson*, which did not involve a mootness issue, the defendant served excess prison time as a result of certain vacated sentences. He was released to begin serving his mandatory three-year term of supervised release and filed a motion, seeking a credit against his supervised release term for the excess time he spent in prison, which was denied. The Supreme Court agreed that the motion could not be granted, because, pursuant to the express terms of 18 U.S.C. § 3624(e), a supervised release term does not commence until an individual is released from imprisonment and, therefore, a credit was not automatic. 529 U.S. at 57.

District Court may not render an advisory opinion in Burkey's case, because "[t]he duty of [the] court ... is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it," *Mills v. Green*, 159 U.S. 651, 653 (1895).

While our sister courts of appeals have found a live case or controversy where a "possibility" exists that a court would reduce a term of supervised release in situations similar to this, *see, e.g., Levine*, 455 F.3d 71, and *Mujahid*, 413 F.3d 991, we are unwilling to do so. We do not believe the reasoning of these cases is supportable, given the Supreme Court's directives in *Lewis* and *Spencer*. In *Cottman*, we concluded that the defendant's challenge to his sentence, if successful, would "likely" have resulted in a reduced guideline range and a credit—given by the same court which originally sentenced him incorrectly—against his term of supervised release. 142 F.3d at 165. We thus adhere to the requirement that the injury must be "likely" to be redressed by the judicial decision. A "possibility" of redress, which is all that *Levine* and *Mujahid* require, is not adequate to survive a mootness challenge. Here, we cannot say that the injury to Burkey will "likely" be redressed by the District Court's grant of his habeas corpus petition.

A comment is in order as to why other courts may have viewed the "possibility" of redress as sufficient to avoid a finding of mootness. The Ninth Circuit, in *Mujahid*, 413 F.3d 991, placed a "heavy" burden on the

government to show mootness, *id.* at 994, but a court has a "special obligation to satisfy itself of its own jurisdiction," *McNasby v. Crown Cork & Seal Co.,* 832 F.2d 47, 49 (3d Cir. 1987), and we have held that it is a petitioner's burden to demonstrate that collateral consequences exist, *United States v. Kissinger,* 309 F.3d 179, 181 (3d Cir. 2002). We think this to be the better view, because it is consistent with the jurisprudence regarding the "presumption" of collateral consequences. For, if not presumed, surely they must be proven; and the petitioner is clearly the one to do so. *Cf. Spencer,* 523 U.S. at 14 ("The question remains, then, whether petitioner demonstrated such consequences."). *Levine* too can be distinguished because there the parties did not raise the mootness issue, leaving the court to address it without the benefit of briefing. 455 F.3d at 77.

We also note that certain permissive language in the Supreme Court's discussion in *Johnson* following its statement that incarceration and supervised release are not interchangeable, could be taken as lessening the petitioner's burden to show a "likelihood" of relief in the context of the mootness inquiry. Following the discussion of its holding, the Court noted that a term of supervised release "may" be modified where an individual serves excess prison time, specifically recognizing the ability of the courts to reduce a term of supervised release when the equities would justify it. The Court stated:

> There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the

> proper expiration of his prison term. The statutory structure provides a means to address these concerns in large part. The trial court, as it sees fit, may modify an individual's conditions of supervised release.

Johnson, 529 U.S. at 60 (citing 18 U.S.C. § 3583(e)(2)).

While this could be said to lower the bar where proving sufficient collateral consequences is required, we view it, instead, as nothing more or less than an appropriate reference to the discretion of a sentencing court to modify a term of supervised release pursuant to § 3583(e). Consistent with this, we have referred to this language in support of our ruling in *Cottman* that the sentencing court likely would alter the term of supervised release upon a conclusion that the sentence *it* imposed was improper. 142 F.3d at 165. And, in *Jackson*, we cited this language from *Johnson*, and then stated: "Accordingly, a likely credit against a defendant's term of supervised release for an excess term of imprisonment still remains valid after *Johnson*." *Jackson*, 523 F.3d at 239. However, no court has held that the existence of the discretion available under the supervised release statute, 18 U.S.C. § 3583(e), is probative of the question of whether it is "likely," as is required by *Lewis* and *Spencer* as part of the inquiry into mootness, that a sentencing court in a particular case will provide relief such that a sufficient collateral consequence is shown. Thus, we do not agree with the reasoning of the Second and Ninth Circuits, and conclude that adherence to the appropriate Article III standards set

forth in *Lewis* and *Spencer* requires affirmance.

For the foregoing reasons, we will AFFIRM the order of the District Court dismissing Burkey's habeas corpus petition as moot.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

JOHN BURKEY,	)	C.A. No. 06-122
	)	Erie
Petitioner,	)	
	)	
v.	)	
	)	
HARRY G. LAPPIN,	)	District Judge
	)	McLaughlin
Respondent.	)	Chief Magistrate
	)	Judge Baxter

MEMORANDUM ORDER

This habeas action filed pursuant to 28 U.S.C. § 2241 was referred to Chief United States Magistrate Judge Susan Paradise Baxter for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrate Judges. In the petition for habeas relief, Petitioner challenged the Bureau of Prisons' (the "BOP's") determination that he was not eligible for a reduction to his term of imprisonment under 18 U.S.C. § 3621(e)(2)(B)'s early release provision. He contended, *inter alia*, that the rule applied to automatically deny him early release–Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01–was promulgated in

violation of the notice and comment requirements of the Administrative Procedures Act (the "APA"), 5 U.S.C. § 553(b), and is, therefore, invalid. As relief, he requested that this Court order his immediate release from imprisonment. (*See* Doc. No. 3 at 2; Doc. No. 19 at 9-10).

On August 31, 2007, Chief Magistrate Judge Baxter issued her Report and Recommendation. (Doc. No. 20). She determined that the BOP had, as Petitioner contended, violated the APA. She recommended that Petitioner's request for habeas relief be granted.

Respondent did not file objections to the Report and Recommendation. Instead, on September 10, 2007, he filed a *Notice of Suggestion of Mootness* informing us that the BOP had released Petitioner from imprisonment on September 7, 2007. (Doc. No. 21). He contends that because Petitioner has, through his release, achieved the object of his Petition, this case is now moot.

Generally, when a prisoner is challenging the BOP's execution of his sentence pursuant to a petition for writ of habeas corpus, the petition becomes moot if the prisoner completes his term of imprisonment before the habeas proceedings have concluded. *See e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998); *Lane v. Williams*, 455 U.S. 624, 631-34 (1982). This rule stems from the well-established principle that federal courts do not have jurisdiction to decide an issue unless it presents a live case or controversy as required by Article III of the Constitution. *Spencer*, 523 U.S. at 7.

"This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate ... the parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Id.* (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)). Thus, if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant effective relief, the case must be dismissed as moot. *See e.g.*, *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698-99 (3d Cir. 1996); *New Rock Asset Partners v. Preferred Entity Advancements*, 101 F.3d 1492, 1496-97 (3d Cir. 1996); *see also* 13A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3533.3 (2d ed. 1984 & 2007 Supp.) ("The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.")

Petitioner argues that this case is not moot. He contends that he has suffered a collateral injury from the BOP's alleged APA violation because the unlawfully promulgated rule's application to him resulted in the service of excess prison time, which in turn led to the delayed commencement of his three-year term of supervised release. (Doc. No. 22). He admits that to avoid a finding of mootness, he must demonstrate that the delayed commencement of his supervised release is "likely to be redressed by a favorable judicial decision" from this Court. (Doc. No. 22 at 1-2 (quoting Spencer, 523 U.S. at 7). He does not dispute Respondent's contention that this habeas court

cannot shorten the term of supervised release. *See also United States v. Johnson*, 529 U.S. 53 (2000); *Williams v. Sherman*, 214 Fed.Appx. 264, 266 (3d Cir. 2007); *Hinton v. Miner*, 138 Fed.Appx. 484 (3d Cir. 2005). Nevertheless, he contends, we can still provide him with effective relief because if we adopt the magistrate judge's Report and Recommendation, he will use our decision to support a motion to modify his term of supervised release under 18 U.S.C. § 3583(e), which he intends to present to the Honorable Solomon Oliver, Jr., of the United States District Court for the Northern District of Ohio, who sentenced him in July 2003. He argues that "[a] favorable decision in this case will likely allow [him] to redress the injury he has suffered" because it will enable him to receive relief from his sentencing court. (Doc. No. 22 at 2).

We reject Petitioner's argument. It is pure speculation that a favorable decision from this Court would "likely" result in his sentencing court reducing or terminating his supervised release term under Section 3583(e). Petitioner relies upon *dicta* in *United States v. Johnson*, 529 U.S. 53 (2000), in which the United States Supreme Court suggested that a federal sentencing court may decide "as it sees fit," to modify an individual's term of supervised release under Section 3583(e) if he was incarcerated beyond the proper expiration of his prison term. *Id.* at 60. It does not follow that a case or controversy continues in the case before us, however. Because we cannot predict what weight, if any, the sentencing court will accord to a determination by us that Petitioner was improperly denied Section 3621(e)(2)(B)'s early release benefit, we are not persuaded that a favorable decision from us

likely will result in his sentencing court shortening his supervised release term.

Additionally, we find that the actual holding in Johnson cuts against Petitioner's argument. In that case, the Supreme Court held that under the express terms of 18 U.S.C. § 3624(e), supervised release commences when an individual "is released from imprisonment," not when he should have been released from imprisonment.[1] *Johnson*, 529 U.S. at 57. In support of its holding, it stated:

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[1] Roy Lee Johnson was originally sentenced in federal district court to an aggregate term of imprisonment of 111 months on multiple convictions for drug and firearms related offenses, to be followed by a three-year term of supervised release. *Johnson*, 529 U.S. at 54-55. He subsequently filed a motion under 28 U.S.C. § 2255 to vacate two of his convictions, which the Government did not oppose. *Id.* at 55. The district court vacated the challenged convictions and modified Johnson's term of imprisonment to fifty-one months. *Id.* He had already served more than that amount of time, so the district court ordered his immediate release. *Id.* His term of supervised release then went into effect. Johnson filed another motion under 28 U.S.C. § 2255 to modify his sentence, requesting that the district court reduce his supervised release term by two and one-half years, the extra time served on his vacated convictions. *Id.* The district court denied relief, "explaining that pursuant to 18 U.S.C. § 3624(e) the supervised release commenced upon Johnson's actual release from incarceration, not before. Granting [Johnson] credit, the [district] court observed, would undermine Congress' aim of using supervised release to assist convicted felons in their transition to community life." *Id.* The United States Court of Appeals for the Sixth Circuit reversed in *Johnson v. United States*, 154 F.3d 569 (6th Cir. 1998). It accepted Johnson's argument that his term of supervised release commenced not on the day he left prison confines but earlier, when his lawful term of imprisonment expired. *Id.* at 55-56 (citing *Johnson v. United States*, 154 F.3d at 571). Awarding Johnson credit for the extra time served, the

While the text of § 3624(e) resolves the case, **we observe that our conclusion accords with the statute's purpose and design. The objectives of supervised release would by unfulfilled if excess prison time were to offset and reduce terms of supervised release. Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.** *See* [18 U.S.C.] § 3553(a)(2)(D); United States Sentencing Commission, Guidelines Manual §§ 5D1.3(c), (d), (e) (Nov.1998); *see also* S.Rep. No. 98-225, p. 124 (1983) (declaring that "the primary goal [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short

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Sixth Circuit Court concluded, would provide meaningful relief because supervised release, while serving rehabilitative purposes, is also "punitive in nature."" *Id.* at 56 (quoting *Johnson v. United States*, 154 F.3d at 572-73).

In a unanimous decision, the Supreme Court reversed the Sixth Circuit Court. It held that 18 U.S.C. § 3624(e) unambiguously provides that supervised release cannot commence until an individual actually "is released from imprisonment." *Johnson*, 529 U.S. at 57.

period in prison for punishment or other purposes but still needs supervision and training programs after release"). Sentencing courts, in determining the conditions of a defendant's supervised release, are required to consider, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant," "the need ... to afford adequate deterrence to criminal conduct; ...to protect the public from further crimes of the defendant; ... and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." 18 U.S.C. § 3553(a). In the instant case, the transition assistance ordered by the trial court required [Johnson], among other conditions, to avoid possessing or transporting firearms and to participate in a drug dependency treatment program. These conditions illustrate that supervised release, unlike incarceration, provides individuals with postconfinement assistance. *Cf., Gozlon-Peretz [v. United States*, 498 U.S. 395, 407 (1991)] (describing "[s]upervised release [a]s a unique method of postconfinement supervision invented by the Congress for a series of sentencing reforms"). **The Court of Appeals erred in treating [Johnson's] time**

> **in prison as interchangeable with his term of supervised release.**

Id. at 57-58 (emphasis added). In our view, the Supreme Court's emphasis in *Johnson* on the distinct objectives of incarceration and supervised release and its statement that they are not to be viewed as interchangeable punitive measures, actually detract from Petitioner's argument that his sentencing court is "likely" to reduce his term of supervised release based upon a finding that he served some period of excess imprisonment.

Finally, Petitioner has not directed us to any binding authority in which it was held that an Article III case or controversy remained under circumstances similar to those found in this case. We are aware that other courts of appeals have held that an individual's challenge to the execution of his sentence pursuant to a 28 U.S.C. § 2241 habeas petition is not moot upon that individual's release from incarceration because a sentencing court has the ability to shorten the period of supervised release under Section 3583(e). *Gunderson v. Hood*, 268 F.3d 1149 (9th Cir. 2001); *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005); *Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006) (relying in part on *Mujahid*); *see also Johnson v. Pettiford*, 442 F.3d 917, 918 n.7 (5th Cir. 2006) (citing *Mujahid*). We respectfully disagree with those decisions and do not find them to be persuasive on the issue of mootness. In our view, they rely inappropriately on the mere possibility that a sentencing court may modify a term of supervised release based upon a finding by a habeas court that an individual served excess prison time.

More is required to maintain a case or controversy under Article III. *Spencer*, 523 U.S. at 7 (quoting *Lewis*, 464 U.S. at 477, and noting that to maintain a live case or controversy before a habeas court when an individual has been released from imprisonment, it must by "likely" that a collateral injury will be redressed by the habeas court's decision).

Because Petitioner has been released from imprisonment, this Court cannot provide him with effective relief on his habeas claims that the BOP unlawfully denied him Section 3621(e)(2)(B)'s early release benefit. It is therefore ORDERED that the case is DISMISSED AS MOOT. IT IS FURTHER ORDERED that the Clerk of Courts is directed to close this case.

DATE: December 14, 2007

s/ Sean J. McLaughlin
SEAN J. MCLAUGHLIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

JOHN BURKEY,	)	C.A. No. 06-122
	)	Erie
Petitioner,	)	
	)	
v.	)	
	)	
HARRY G. LAPPIN,	)	District Judge
	)	McLaughlin
Respondent.	)	Chief Magistrate
	)	Judge Baxter

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Petition for Writ of Habeas Corpus filed by Petitioner, John Burkey, be granted.

II. REPORT

Petitioner has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the Bureau of Prisons' (the "BOP's") determination that he is not eligible for a reduction in his sentence under 18 U.S.C. § 3621(e)(2)(B)'s early release provision.

[Document # 3]. He claims that the BOP improperly excluded him from early release eligibility based upon the fact that he had previously received that statute's early release benefit during a prior federal incarceration. He contends, *inter alia*, that the rule applied to him to automatically deny him early release–Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01–was promulgated in violation of the Administrative Procedures Act, 5 U.S.C. § 553 (the "APA") and is, therefore, invalid.

A.

On September 13, 1994, Congress enacted the "Violent Crime Control and Law Enforcement Act" ("VCCLEA") (Pub.L. 103-322), which included a new provision at 18 U.S.C. § 3621 that provides an incentive for inmates to participate in substance abuse treatment programs. This incentive allows an inmate to receive a reduction in his or her sentence of up to one year for completing a BOP treatment program. The statute provides:

> **Period of Custody** . . . The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2)(B).

Congress did not define the eligibility criteria for early release consideration upon completing a substance abuse treatment program. On May 25, 1995, the BOP published an interim rule, effective June 26, 1995, which was designed to implement the sentence reduction provisions of the VCCLEA. 60 Fed.Reg. 27692; 28 C.F.R. § 550.58 (1995); *Lopez v. Davis*, 531 U.S. 230, 233-36 (2001). In response to both public comment and a division among the courts of appeals over the BOP's interpretation of Section § 3621(e)(2)(B)'s term "nonviolent offense," the BOP issued a revised interim rule on May 17, 1996 (61 Fed.Reg. 25121) and, again, on October 15, 1997 (62 Fed.Reg. 53690). *See Lopez*, 531 U.S. at 233-36.

On December 22, 2000, after notice and comment, the 1997 version of the interim rule was made final, *see* 65 Fed.Reg. 80749, and that rule is set forth at 28 C.F.R. § 550.58, *Consideration for early release.* In relevant part, the regulation provides: "[a]n inmate who was sentenced to a term of imprisonment pursuant to the provisions of 18 U.S.C. Chapter 227, Subchapter D for a non-violent offense, and who is determined to have a substance abuse problem, and who successfully completes a residential drug abuse treatment program during his or her current commitment" may be eligible for early release by a period not to exceed 12 months. 28 C.F.R. § 550.58. The regulation also provides that: "An inmate who has successfully completed a Bureau of Prisons residential drug abuse treatment program on or after October 1, 1989 is otherwise eligible if: (i) the inmate completes all applicable transitional services programs in a community-based program (i.e., in a Community

Corrections Center or on home confinement); and (ii) since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs." *Id.* § 550.58(a)(3)(i) & (ii).

28 C.F.R. § 550.58 also categorically denies Section 3621(e)(2)(B)'s early release to the following groups of inmates, even if an inmate otherwise meets eligibility criteria: (i) INS detainees; (ii) pretrial inmates; (iii) contractual boarders (for example, D.C., State, or military inmates); (iv) inmates who have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses; (v) inmates who are not eligible for participation in a community-based program as determined by the Warden on the basis of his or her professional discretion; and (vi) inmates whose current offense is a certain type of felony. *Id.* § 550.58(a)(1)(i)-(vi)(A-D)).

No portion of 28 C.F.R. § 550.58 addresses a situation like Petitioner's where, as set forth *infra*: an inmate received a sentence reduction through Section 3621(e)(2)(B)'s early release provision and satisfied his sentence; was released; was arrested and convicted a second time; entered the BOP's drug treatment program; and, then sought to receive another sentence reduction. The BOP explains that, at the time the interim rules for 28 C.F.R. § 550.58 were issued and published (May 1995 through October 1997), no inmate convicted of additional crimes after receiving a Section 3621(e)(2)(B) sentence reduction had sought a

subsequent sentence reduction, nor had the BOP provided inmates convicted of additional crimes after receiving a Section 3621(e)(2)(B) sentence reduction with the option of receiving a subsequent sentence reduction. (Document # 12, Exhibit 3 at ¶ 4).

After issuance of the interim rules, the BOP explains, the issue regarding the possibility of repeating Section 3621(e)(2)(B) early releases came to the attention of its Director. On December 17, 1998, Operations Memorandum 089-98, *Central Office Review of 3621(e) Release Cases, Interim Procedures*, was released to address this and other issues relating to Section 3621(e)(2)(B) early release. (Id. ¶ 5). The Operations Memorandum provided, in part:

> Previous 3621(e) Release - Some inmates have been released under 3621(e), and have been returned to prison on supervised release violations. These inmates may not be eligible for early release even though they are participating in the residential drug program during this separate commitment.

(Document # 12, Exhibit 3a).

The BOP states that the Operations Memorandum was issued because of the Director's concern that if inmates were allowed to receive multiple Section 3621(e)(2)(B) sentence reductions, its Residential Drug Abuse Treatment Program ("RDAP") could be used as a "revolving door" for career criminals to gain quicker

access to their victims in the community, and because inmates who engage in further criminal activity involving drugs display a readiness to endanger themselves and others, they should not be released months in advance of completing their sentences. (Document # 12, Exhibit 3 at ¶ 9). The Director determined that, if inmates were permitted a second early release, not only would Congressional intent be undermined, but the limited space in the RDAP could be filled with inmates seeking second, third, or even fourth sentence reductions. (*Id.*)

On December 31, 2000, Operations Memorandum 089-98 lapsed. Almost three years later, on September 29, 2003, the BOP issued **Program Statement 5331.01, *Early Release Procedures Under 18 U.S.C. § 3621(e)***–the program statement at the center of this proceeding.[1] The purpose of the program statement "is to establish criteria and procedures when considering an inmate for early release." P.S. 5331.01, Page 1. At Paragraph 5(c) of the program statement, the BOP sets forth the categories of inmates that are not eligible for early release. *Id.*, Page 2. It repeats the categories of inmates that are denied Section 3621(e)(2)(B)'s early release as set forth in 28 C.F.R. § 550.58(a)(1)(i)-(vi)(A-D).[2] It also denies early release to one additional group of inmates:

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[1] A complete copy of Program Statement 5331.01 is located at Document # 12, Exhibit 1f.

[2] The program statement expressly states that parole eligible inmates may not receive early release. 28 C.F.R. § 550.58 provides that such inmates are not eligible for early release by limiting early release to inmates sentenced to a term of imprisonment pursuant to the provisions of 18 U.S.C. Chapter

> **Prior Early Release Granted.** Inmates may earn an early release for successful RDAP completion only once. *Inmates returning on supervised release violations and/or inmates who are sentenced for new offenses are not eligible for early release if they received it previously.*

Id., Page 3 (emphasis added).

B.

In 1996, Petitioner was incarcerated at the Federal Correctional Institution at McKean ("FCI-McKean") in Bradford, Pennsylvania, where he was serving an aggregate sentence (to be followed by a term of supervised release) that he had received for federal drug convictions. The BOP determined that he was eligible for early release pursuant to Section 3621(e)(2)(B). He was transferred to the Federal Medical Center at Lexington, Kentucky, to participate in its RDAP. He completed the program, and on June 19, 1998, he received an early release pursuant to Section 3621(e)(2)(B) and satisfied his term of imprisonment.

During his release, Petitioner committed federal drug crimes and, on July 17, 2003, he was sentenced in The United States District Court for the Northern

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227, Subchapter D. *See* 97 Fed.Reg. 25121-22 ("Inmates sentenced under 'old law' provisions are not eligible, regardless of their eligibility for parole.")

District of Ohio to a 57-month term of imprisonment with a 3-year term of supervised release to follow for "Conspiracy to Possess with Intent to Distribute 100 Kilograms or More of Marijuana," in violation of 21 U.S.C. § 846. The court recommended that the BOP place him in a substance abuse program. Additionally, on around August 4, 2003, the court imposed a three-month supervised release violator term, to be served concurrent to the 57-month term of imprisonment that he was already serving.

On December 7, 2004, the BOP informed him that he was provisionally determined to be eligible for early release pursuant to Section 3621(e)(2)(B) and he was placed on the RDAP waiting list. (Document # 12, Exhibit 1e). That determination was made in error because Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 (which had been in effect for over a year by that point) expressly prohibits inmates from receiving the early release benefit more than once. On October 13, 2005, the BOP realized its error and notified Petitioner that, although he was qualified to participate in the RDAP, he was *ineligible* for early release under Section 3621(e)(2)(B) because he had previously received an early release under that statute. (Document # 12, Exhibits 2e & 2f). No other reason was provided for the denial of early release.

Petitioner filed a Request for Administrative Remedy with the Warden in which he argued that the application to him of Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 violated the *Ex Post Facto* Clause. (Document # 12, Exhibit 1b). The Warden denied relief, and Petitioner

filed a Regional Administrative Remedy Appeal in which he argued an *ex post facto* violation and that it was an abuse of discretion to deny him early release. (Document # 12, Exhibit 1c). Upon denial of that appeal, he filed a Central Office Administrative Remedy Appeal. (Document # 12, Exhibit 1d). There, he argued for the first time that Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 was issued in violation of the APA. (*Id.*)

On March 28, 2006, Petitioner's Central Office Administrative Remedy Appeal was denied. Harrell Watts, Administrator, National Inmate Appeals, advised him that his *ex post facto* claim had no merit. (*Id.* at 4). The APA claim was not addressed, perhaps because under the applicable regulations an inmate may not raise on appeal issues not raised in the lower level filings. 28 C.F.R. § 542.15.

Upon completion of his administrative remedies, Petitioner commenced the instant action by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Thomas W. Patton, Esquire, Assistant Federal Public Defender, was appointed to represent him.

Because it appeared that Petitioner may not have properly exhausted the APA claim since he did not raise it during his lower level administrative remedy filings, *Harden v. Sherman*, Civil Action No. 05-356 Erie, *slip op.*, 2006 WL 3814767 (W.D. Pa. Dec. 27, 2006), oral argument was scheduled on exhaustion and procedural default. (Document # 14). However, the BOP submitted a motion for clarification and expressly

conceded that Petitioner had exhausted his administrative remedies on all issues raised in the petition. (Document # 15). In light of the BOP's concession, oral argument was conducted on July 26, 2007, and was limited to the merits of the APA claim. The transcript of that argument is at Document # 17.

C.

Although a challenge to a federal sentence *as imposed* must be made under 28 U.S.C. § 2255, a claim concerning execution of a federal sentence by federal prison and parole authorities is properly brought under 28 U.S.C. § 2241. *Bennett v. Soto*, 850 F.2d 161 (3d Cir. 1988); *Gomori v. Arnold*, 533 F.2d 871 (3d Cir. 1976). Because Petitioner is challenging the terms (*i.e.*, execution) of his sentence, his habeas petition is properly brought under 28 U.S.C. § 2241.

D.

Petitioner contends that the BOP violated the APA when it issued Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 without complying with the APA's notice-and-comment requirements. The APA provides that an agency may not adopt a "rule" (commonly referred to as a "legislative rule" or "substantive rule") without providing prior notice and comment through publication in the Federal Register. 5 U.S.C. § 553(b), (c). It defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization,

procedure, or practice requirements of an agency[.]" *Id.* § 551(4). Rules that are issued in violation of the APA are invalid.

The BOP counters that Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is not a "rule" as defined by the APA. Instead, it argues that provision of the program statement is an "interpretative rule" and, as such, is exempt from the APA's notice-and-comment requirements. *Id.* § 553(b)(3)(A). If it is not an interpretative rule, the BOP contends, then it is a "general statement of policy," which also is exempt. *Id.*

(i)

The APA does not define "interpretative rule." In *Dia Navigation Company v. Pomeroy*, 34 F.3d 1255 (3d Cir. 1994), the United States Court of Appeals for the Third Circuit acknowledged that "[t]he distinction between 'substantive' or 'legislative' rules and 'interpretive' or 'interpretative' rules has proven to be one incapable of being drawn with much analytical precision. Indeed, courts customarily begin recitations of the law on the subject with remarks such as 'the distinction is fuzzy'; 'enshrouded in considerable smog'; or 'far from crystal clear.'" *Id.* at 1264 (internal citations omitted). Nonetheless, the Court of Appeals found that basic principles have emerged to guide a court in distinguishing between the two types of rules. *Id.*

"Interpretative rules" are statements of policy issued by an agency setting forth how it interprets or

construes a statute or regulation. *Id.* (citing *FLRA v. Dep't of the Navy*, 966 F.2d 747 (3d Cir. 1992) (en banc); *Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989); *United States v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232, 1238 (3d Cir. 1986)). In contrast, "legislative rules" "create rights, assigns duties, or impose obligations that are not already outlined in the statute itself[.]" *Id.* (citing *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992)).

"Put yet another way," the Court of Appeals stated:

> what distinguishes interpretative from legislative rules is the legal base upon which the rule rests. If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule. *If, however, the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one.*

Id. (emphasis added) (quoting *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987)).

Although application of the above-cited principles can in some cases result in a "somewhat Delphic" exercise, *id.*, in the instant action the task before this Court is not so complicated. Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is not interpreting any statute or regulation. It is–

similar to the other rules set out in 28 C.F.R. § 550.58 that were properly presented for notice and comment–an exercise of the discretion afforded to the BOP to exclude a specific category of inmates from receipt of the Section 3621(e)(2)(B) early release benefit. It is a rule "based on [the BOP's] power to exercise its judgment as to how best to implement [Section 3621(e)(2)(B)]" and is therefore "a legislative one." *Id.* at 264 (quoting *United Technologies Corp.*, 821 F.2d at 719-20).

The determination that the rule at issue here is not an "interpretative rule" is so unavoidable that the BOP has been unable to offer this Court an argument that would persuade it to hold otherwise. In its initial brief to the Court, it contended that Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is an interpretative rule because it "clarified the regulation set forth at 28 C.F.R. § 550.58(a)(3)(ii)." (Document # 12 at p. 9). The BOP's argument was patently wrong and unsupportable,[3] and its counsel withdrew it at oral argument. (7/26/2007 Tr. at 23.)

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[3] 28 C.F.R. § 550.58(a)(3)(ii) limits early release to inmates who have successfully completed the RDAP on or after October 1, 1989, and who have not been found to have committed "a prohibited act of 'greatest severity' or an act involving alcohol or drugs." The BOP provided the Court with no explanation as to how Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 clarified or interpreted 28 C.F.R. § 550.58(a)(3)(ii). In a footnote, it simply stated: "Clearly a new federal conviction, and specifically a federal conviction for drug use, possession and/or trafficking, amounts to at least a prohibited act of the greatest severity level, and/or a prohibited act which involves alcohol or drugs." (Document # 12 at p. 9 n.5). The regulation, however, denies Section 3621(e)(2)(B) early release to those inmates who, although they completed a drug

Left without its sole argument to support its contention that Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is an interpretative rule, the BOP now contends that that program statement is actually interpreting Section 3621(e)(2)(B) itself. This argument is unconvincing. The only limitations Section 3621(e)(2)(B) places on early release is conviction of a nonviolent offense and completion of a substance abuse treatment program. *Lopez*, 531 U.S. at 241. When the BOP exercises its discretion and places further restrictions on early release, it is implementing Section 3621(e)(2)(B), not interpreting it. And, although the Supreme Court in *Lopez* expressly held that the BOP was free to exercise its discretion to place further restrictions on early release than that set forth in the statute, *id.*, the BOP, of course, must comply with the APA notice-and-comment procedures when it does so, as it did when it promulgated the rules set forth in the final version of 28 C.F.R. § 550.58.

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treatment program, committed certain prohibited acts *as inmates*. *See also* 28 C.F.R. § 541.13 *Prohibited acts and disciplinary severity scale* (defining "prohibited acts"). The legislative history confirms that it was promulgated to apply to inmates that "maintain[ed] a discipline record" as specified therein. 60 Fed.Reg. 27693. It does not govern individuals such as Petitioner, who committed a criminal act while they were released. Petitioner's federal drug conviction is not, as the BOP initially argued before this Court, either a prohibited act of the greatest severity level or a prohibited act which involves alcohol or drugs.

(ii)

Because Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is not an interpretative rule, this Court must next consider whether it qualifies as a "general statement of policy," which would also be exempt from the APA notice-and-comment requirements. 5 U.S.C. § 553(b)(3)(A).

The APA does not define "general statement of policy." However, case law from the United States Court of Appeals for the District of Columbia illustrates the difference between "rules" subject to the APA and "general statements of policy." The key factor is the binding nature of the rule.[4] "If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures." *General Electric Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (quoting Robert A Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them to Bind the Public?* 41 DUKE L.J.1311, 1355 (1992)).

Therefore, if a policy statement uses "mandatory, definitive language," it does not qualify as a "general

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[4] In contrast, interpretative rules may have "binding" or "nondiscretionary" effect on the agency. *See Dismas Charities, Inc. v. United States Department of Justice*, 401 F.3d 666, 681 (6th Cir. 2005); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004).

statement of policy." *United States Telephone Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (noting that it has "said repeatedly" that the line between an invalid legislative rule and a valid policy statement "turns on an agency's intention to bind itself to a particular legal position"); *Pub. Citizen, Inc. v. United States Nuclear Regulatory Comm'n*, 940 F.2d 679, 681-82 (D.C. Cir. 1991) ("In determining whether an agency statement is a substantive rule, which requires notice and comment, or a policy statement, which does not, the ultimate issue is 'the agency's intent to be bound.'"); *Alaska v. United States Dep't of Transp.*, 868 F.2d 441, 445-46 (D.C. Cir. 1994) (a "general statement of policy" must "genuinely leave[ ] the agency ... free to exercise discretion.") (quoting *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 945-46 (D.C. Cir. 1987) (ellipsis in original)); *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (if a statement denies the decisionmaker discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement's position the statement is binding and must be treated as a legislative rule). *See also* 1 C. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 4.11 (2d ed. and Supp. 2006) (general statements of policy "should not purport to establish a 'binding norm'"; "For many courts, ... the critical factor for determining whether the new policy constitutes an excepted statement is whether it left the agency officials free to exercise discretion in an individual case.") (citing *Pacific Gas and Electric Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (emphasis added)). As Professor John F. Manning has explained:

> Although rarely discussed in explicit terms, the apparent rationale is straightforward: If an agency is announcing its future intentions in tentative terms, how can anyone object to its doing so without the formalities of notice-and-comment rulemaking? Conversely, if an agency rule could make legally binding policy without going through those formalities, what incentive would it have to invoke the more cumbersome procedures? Accordingly, a policy statement's validity hinges quite directly on the agency's intention–or, more accurately, its lack of intention–to bind either itself or the public.

John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 918 (2004).

At oral argument, the BOP's counsel admitted the obvious: Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is binding. (7/26/2007 Tr. at 27, 39). A BOP employee has no discretion to ignore the program statement and exercise his or her own discretion as to whether a second or subsequent Section 3621(e)(2)(B) early release should be granted to an individual based upon the individual history of the inmate under consideration for early release. Once a BOP employee determines that an inmate has had a prior Section 3621(e)(2)(B) early release, the employee must find the inmate ineligible for another early release under that statute.

In an effort to avoid a determination that Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is binding, the BOP has–for the second time in this proceeding–retracted a position that it previously unequivocally presented to this Court. In its post-hearing brief, the BOP now contends that it "stands corrected" and that Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is *not* binding. (Document # 18 at pp. 4-7). It is not binding, according to the BOP, because a Warden may seek a waiver from any of the non-regulatory provisions contained in any of the BOP program statements when his or her institution "is unable to comply with the provision of a policy due to some unique condition." (Document # 18 at p. 5 (quoting P.S. 1221.66, Chapt. 13, Page 1 (attached to Document # 18 at Exhibit 1b)).

As Petitioner convincingly demonstrates in his post-hearing brief (Document # 19), the BOP's most recent about-face is wholly unconvincing. The fact that a Warden must seek a waiver from any otherwise mandatory directive contained in a program statement if he or she cannot comply with that provision establishes that those mandatory directives are binding. If not, then a Warden would have no need to get a waiver. The Court of Appeals for the District of Columbia Circuit explained as much in *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987). At issue in that case were "action levels" issued by the Food and Drug Administration. *Young*, 818 F.2d at 945. The action levels informed food producers of the allowable levels of unavoidable contaminants in food, particularly, aflatoxins in corn. *Id.* A consortium

of organizations and private citizens challenged the FDA's promulgation of the action levels claiming that the FDA had not complied with the APA when enacting the action levels. The FDA claimed that the action levels were "nothing more than nonbinding statements of agency enforcement policy" and therefore exempt from the APA's notice-and-comment requirements. *Id.* at 945-96. The Court of Appeals for the District of Columbia rejected this argument, in part, because the FDA required food producers to obtain exceptions from the action levels if they wished to market any food that contained contaminant levels above those set in the action levels. It observed:

> A specific regulatory provision allows FDA to "exempt from regulatory action and permit the marketing of any food that is unlawfully contaminated with a poisonous or deleterious substance" if certain conditions exist. [21 C.F.R.] § 109.8(a). This language implies that in the absence of an exemption, food with aflatoxin contamination over the action level is "unlawful." This putatively unlawful status can derive only from the action level, which again, indicates that the action level is a presently binding norm. If, as the agency would have it, action levels did indeed "not bind courts, food producers or FDA," Supplemental Brief for Appellee at 7, it would scarcely be necessary to require that "exceptions" be obtained.

Id. at 947.

Thus, the fact that a Warden would need to receive a waiver if his or her institution sought not to comply with the mandate set forth in Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 demonstrates that the rule contained therein is the binding norm. The BOP's belated argument that the program statement is not binding is rejected.

(iii)

In conclusion, Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 is not an interpretative rule and it is not general statement of policy. It fits squarely within the APA's definition of a "rule" – it is "part of" the BOP's "statement of general or particular applicability and future effect designed to implement" Section 3621(e)(2)(B). 5 U.S.C. § 551(4). As such, the BOP was required to provide prior notice and an opportunity to comment on it through publication in the Federal Register. 5 U.S.C. § 553(b), (c). In his post-hearing brief, Petitioner appropriately addresses the importance of the APA's notice-and-comment requirement, observing that a significant portion of the liberty enjoyed by the citizens of this country is subject to the discretion of unelected officials employed in administrative agencies. (Document # 19 at p. 5).

> In a sense, notice-and-comment procedures serve as a Congressionally mandated proxy for the procedures which Congress itself employs in fashioning its

> 'rules,' as it were, thereby insuring that agency 'rules' are also carefully crafted (with democratic values served by public participation) and developed only after assessment of relevant considerations. It is thus, in theory, important for APA procedures to be followed before an agency pronouncement is deemed a binding legislative rule not merely because the APA says so, but because in saying so the APA is protecting a free people from the danger of coercive state power undergirding pronouncements that lack the essential attributes of deliberativeness present in statutes.

Cmty. Nutrition Inst., 818 F.2d at 951 (Starr, J., concurring in part and dissenting in part).

The question presented in this case is not whether the BOP may categorically deny Section § 3621(e)(2)(B) early releases to inmates who have previously received that benefit. It does. *Lopez*, 531 U.S. at 238-45. Instead, the question for this Court is whether the BOP complied with the APA by allowing public participation through notice and comment so that Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 was developed only after assessment of relevant considerations. It did not. The BOP cannot avoid the requirements of the APA by placing its legislative rules in its program statements, instead of first publishing them in the Federal Register.

E.

The BOP urges that, if this Court grants the writ, the proper relief is to remand the case to it for reconsideration of Petitioner's early release without regard to Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01. Petitioner objects. He argues that the BOP has established a categorical approach, as opposed to an individualized approach, to Section 3621(e)(2)(B) early releases. *Lopez*, 531 U.S. at 243-44. Program Statement 5331.01 and 28 C.F.R. § 550.58 show the categorical nature of the Section 3621(e)(2)(B) early release decision (as do the documents the BOP submitted to this Court specific to Petitioner's evaluation). If an inmate is "eligible" for an early release, then he or she receives an early release. The BOP does not deny that it does not engage in any individual consideration beyond the eligibility requirements set forth in Program Statement 5331.01 and 28 C.F.R. § 550.58. Accordingly, Petitioner contends, if he is "eligible," he gets an early release, and the only thing keeping him from being eligible for early release is the application of Paragraph 5(c), *Prior Early Release Granted*, of Program Statement 5331.01 to him. Since that rule is invalid, Petitioner argues, he is eligible for, and must receive, an early release.

Petitioner's position is persuasive. He has completed all the necessary programs to receive early release, and he, in fact, has less than one month remaining on his term of imprisonment. There is nothing before this Court to indicate that, if only valid rules were applied to him, he would have received an

early release of less than the short amount of time remaining on his term of imprisonment. Therefore, in this case, the Court should direct the BOP to immediately release Petitioner.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that the Petition for Writ of Habeas Corpus be granted and that the BOP be directed to immediately release Petitioner.

In accordance with 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates Judges, the parties are allowed ten (10) days from the date of service to file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights. *See Nara v. Frank*, 488 F.3d 187 (3d Cir. 2007).

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
Chief U.S. Magistrate Judge

Dated: August 31, 2007

APPENDIX D

United States District Court
Northern District of Ohio
Eastern Division

United States of America
v.
John W. Burkey

Judgment in a Criminal Case
(For Offenses Committed On or After November 1, 1987)
Case Number:
5:01CR213-15

Counsel for the Defendant:
Harvey Bruner
Counsel for the United States:
Blas E. Serrano, Asst. U.S. Atty.
Court Reporter: Cynthia Lee

THE DEFENDANT:
X pleaded guilty to count 1 of the indictment

pleaded nolo contendere to count(s) which was accepted by the court

Was found guilty on count(s) after a plea of not guilty

FILED
03 Jul 18 PM 3:51
United States District Court
Northern District of Ohio
Cleveland

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section Number(s)	Nature of Offense	Date Offense Concluded	Count
21 U.S.C. § 846	Conspiracy to Possess with Intent to Distribute 100 Kilograms or More of Marijuana, a Class B felony	6/6/2001	1

The defendant is sentenced as provided in pages 1 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)

X Count 24 of the indictment as to this defendant is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
293-62-4199
Defendant's Date of Birth:
11/22/63
Defendant's USM Number:
51717-060

Defendant's Residence Address:
2209 Lake Rockwell Road
Franklin Township, Ohio 44266
330-296-3617

Defendant's Mailing Address:
2209 Lake Rockwell Road
Franklin Township, Ohio 44266
330-296-3617

July 17, 2003
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

Solomon Oliver, Jr.
United States District Judge

Date: July 17, 2003

DEFENDANT: Burkey, John W.
CASE NUMBER: 5:01CR213-15

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 57 months.

The Court makes the following recommendations to the Bureau of Prisons: Credit for time served. Placed in a substance abuse program and if eligible participate in the "Boot Camp Program."

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district

At A.m./p.m. on

as notified by the United States Marshal

The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons when notified:

before 2:00 p.m. on the date indicated as notified by the United States Marshal.

Before 2:00 p.m. on

as notified by the United States Marshal.

As notified by the Probation or Pretrial Services Office.

X The defendant shall continue under the terms and conditions of his present bond pending surrender to the institution.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ To _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: Burkey, John W.
CASE NUMBER: 5:01CR213-15

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation offices in the district in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

Pursuant to 18 U.S.C. 3583(d), the court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is

authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

Unless otherwise stated in this Judgment, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule

of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

X The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

X The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at anytime at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

___ The defendant shall reside in a community treatment center, halfway house, or similar facility for a period of Days/months to begin not later than ___ (Work/medical release privileges granted).

___ The defendant is committed to the custody of the Bureau of Prisons for ___ Months. It is recommended that the Comprehensive Sanctions Center be designated as the place of confinement.

___ Upon release from the imprisonment portion of this sentence, the defendant shall be placed on supervised release for ___ Years. (Split-Sentence)

___ The defendant shall participate in the Home Confinement Program with/without Electronic Monitoring for a period of ___ Days/months beginning no later than 30 calendar days from sentencing. You are required to remain in your residence unless you are given permission in advance by your Probation Officer to be elsewhere. You may leave your residence to work, to receive

medical treatment and to attend religious services. You shall wear an electronic monitoring device, follow electronic monitoring procedures and submit to random drug/alcohol tests as specified by the Probation Officer. The defendant may participate in the Earned Leave Program under terms set by the Probation Officer. The defendant shall be required to pay the cost of the Home Confinement Program as directed by the Probation Officer.

___ The defendant is not required to pay the costs associated with the Home Confinement Program.

___ The defendant shall perform ___ Hours of community service as directed by the Probation Officer.

___ The defendant shall reside and participate in a residential drug treatment program as instructed by your Probation Officer, until discharged by the facility and as approved by your Probation Officer.

___ The defendant shall participate in, and successfully complete, a cognitive restructuring program as instructed by your Probation Officer.

_X_ The defendant shall participate in an outpatient program approved by the U.S. Probation Office for the treatment for drug and/or alcohol abuse which

will include testing to determine if the defendant has reverted to substance abuse.

___ The defendant shall participate in an outpatient mental health program as directed by the Probation Officer.

___ The defendant shall permit his Probation Officer to conduct random searches and examinations of any personal computer/computing systems utilized by the defendant. The defendant shall assist such searches by providing all passwords and password phrases, together with all other information necessary to enable access to any and all computer files.

___ The defendant shall provide the Probation Officer access to any requested financial information.

___ The defendant shall not incur new credit charges or open additional lines of credit without the approval of the Probation Officer unless the defendant is in compliance with the payment schedule.

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FINE AND/OR RESTITUTION

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$-0-	$n/a

If applicable, restitution amount ordered pursuant to plea agreement.....$

Payments are to commence during the period of confinement through Bureau of Prisons Inmate Financial Responsibility Program in an amount determined to be appropriate.

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

The interest requirement is waived for the
fine and/or
restitution.

The interest requirement for the
fine and/or
restitution is modified as follows:

RESTITUTION

The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee		**Total Amount of Loss	Amount of Restitution Ordered	Priority Order Or Percentage of Payment
	Totals:	$	$	

Additional Restitution Payees
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. **X special assessment of $100.00 is due in full immediately on count 1.**

B. Lump sum payment of $___ due immediately, balance due
no later than _____, or
in accordance with ___C, ___D, or ___E below; or

C. Payment to begin immediately (may be combined with __C, __D, or __E below); or

D. Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $__ over a period of

_____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of

This judgment; or

E. Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release

From imprisonment to a term of supervision; or

F. Special instructions regarding the payment of criminal monetary penalties:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed. **PAYMENT IS TO BE MADE PAYABLE AND SENT TO THE CLERK, U.S. DISTRICT COURT.**

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.